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Supreme Court of the United States

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DANIEL S. GILLMOR,
HENRY H. ABRAMS, and
PYRAMID COMMERCIAL CORPORATION,
suing on its own behalf and on behalf of other owners and holders of certain mortgage bonds,
Petitioners,

v.

THE INDIANAPOLIS GAS COMPANY,
CITY OF INDIANAPOLIS,
Respondents.

Nos. 466, 467 and 468.

BRIEF OF CITY OF INDIANAPOLIS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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These actions were originally commenced by each of the three petitioners against respondent, The Indianapolis Gas Company, in the United States District Court.

Defendant, Indianapolis Gas Company, filed a third-party complaint against respondent, City of Indianapolis, but the petitioners did not plead over against the third-party-defendant and have never sought to recover any judgment against it.

The cases were consolidated for trial in the District Court which made detailed Findings of Fact in each of the

cases (R. 228-255, 329-330, 393-397). Separate judgments were entered in favor of both defendants from which judgments petitioners prosecuted appeals to the Circuit Court of Appeals for the Seventh Circuit. The cases were there consolidated for hearing and disposition and the judgment of the lower court was affirmed. The amended opinion of the Circuit Court of Appeals is found at pages 478 to 496 of the record.

STATEMENT OF FACTS

The accuracy of the Findings of Fact of the District Court is not challenged by respondents, except that they claim that any plan of reorganization which makes provi sion for any payment to stockholders without payment in full of interest to bondholders is necessarily unfair.

It was stipulated in the District Court, "that prior to the time plaintiffs, and each of them purchased their respective bonds, they had notice of the litigation affecting said bonds, including institution of the suit of Chase National Bank against the Indianapolis Gas Company, et al., in this Court, and notice that the Indianapolis Gas Company was, because of such litigation, unable to pay said coupons as they respectively matured *and each plaintiff when it purchased said bonds and coupons had notice of their dishonor.*" (R. 400-401.) (Our emphasis.)

On May 1, 1942, after years of protracted litigation, a large majority of the bondholders of Indianapolis Gas agreed upon a plan or scheme of reorganization, the details of which are set out in petitioners' brief. The stockholders of Indianapolis Gas likewise approved the bondholders' plan.

In pursuance of that plan, the property of Indianapolis Gas was transferred to the City of Indianapolis for a con-

sideration in excess of $9,500,000. As of October 31, 1942, the holders of 83.7% of the bonds and of 98% of the stock had approved the plan.

(Stipulation R. 91-94.)

The bonds owned by the named respondents in these cases aggregate $63,000, or less than 1% of the total issue.

(Stipulation, R. 87 to 88.)

In 1937, the City of Indianapolis commenced an action in the Marion Superior Court (which was taken on change of venue to the Boone Circuit Court), seeking a declaratory judgment that the ninety-nine year lease between Indianapolis Gas and Citizens Gas was unenforceable against the City. That case was pending and was about to be tried when the plan of settlement was adopted (R. 92 —testimony of William R. Higgins, R. 60-61).

If the decision in that case had been adverse to Indianapolis Gas the consequences would have been disastrous to it.

The property of Indianapolis Gas was not worth to exceed $10,000,000. It had an outstanding mortgage debt of $6,881,000, and six years of defaulted interest amounting to $2,064,300. The cost of disconnecting the two properties would have been $1,000,000 and the cost of putting the plant of Indianapolis Gas in a situation to operate would have been $3,800,000. Because of its financial situation, it would have been impossible for Indianapolis Gas to have obtained the required capital to disconnect the properties and to make the necessary repairs and rehabilitations. (R. 68-69-81.)

In addition, Indianapolis Gas would have been at a de-

cided disadvantage in the sale of its coke and the production of its gas because the City owns the Milburn mine at which it produces at a relatively small cost a very high grade of coking coal. Indianapolis Gas owns no such mine and would have suffered a decided disadvantage in the production of its gas and sale of its coke. Indianapolis Gas had not operated its plant since 1913. Had it commenced operations it would have had the task of establishing records and routines, of employing skilled men for its key positions and re-establishing good will. Such work would have been both difficult and expensive. (R. 70-71.)

Interest had been in default on the bonds of Indianapolis Gas for six years and there was no prospect on May 1, 1942, that any interest would be paid thereon within another three years. Because of this protracted litigation the bonds had fluctuated widely in price from 1936 to 1941. The market price for such bonds with all coupons attached from October 1, 1936, to the respective dates set out below were as follows:

1936—low 69 —high 96⅜
1937—low 43 —high 82½
1938—low 49¼—high 84
1939—low 60½—high 88¾
1940—low 60 —high 99¾
1941—low 75 —high 92½

(R. 210-214.)

Neither of petitioners ever requested the Trustee to commence an action against Indianapolis Gas to recover unpaid interest coupons on such bonds (Stip. 20, R. 94.)

Respondent, City of Indianapolis, never made any agreement of any kind in connection with the payment of the bonds and coupons of Indianapolis Gas. (R. 60-81-94.)

The necessary portions of Indianapolis Gas plant which would have been required to be duplicated by the City on May 1, 1942, in order to serve all gas consumers in Indianapolis would have cost approximately $2,500,000 (R. 69).

The Chase suit which was commenced in June, 1936, was dismissed in pursuance of a mandate of the United States Supreme Court on November 10, 1941 (R. 91), but the default in the payment of coupons had been and was continuous.

Indianapolis Gas was reorganized on December 27, 1930, under the Indiana General Corporation Act of 1929 (Stip. R. 400).

The plan or scheme of reorganization was a plan or scheme which was submitted to the bondholders (Ex. 3, R. 138-145.) The letter of transmittal from Chase was dated March 12, 1942 (R. 138), and a letter from the President of Indianapolis Gas to the bondholders was dated March 16, 1942, both of them being substantially 1½ months before the consummation of the plan. A contract was entered into between the City of Indianapolis and Indianapolis Gas on April 23, 1942, providing for the transfer of the property of Indianapolis Gas to the City provided the terms of the contract were complied with (Ex. 18, R. 161). All the named bondholders in these cases had knowledge more than a month prior to the consummation of the plan that the plan was under consideration and that the Board of Directors of Indianapolis Gas had conditionally approved the plan (Exhibits 7 and 8, R. 147-150). The correspondence evidencing this knowledge is between Indianapolis Gas and Karelsen & Kaerlsen who were then attorneys for petitioners and are now attorneys of record for all petitioners. On May 1, 1942, Mr. Donald L. Smith, representing Sterling, Grace & Com-

pany, who in turn represent $78,000 of bondholders who declined to give their names, the dates of purchase or the prices paid therefor, advised Chase and Indianapolis Gas not to make any payments to stockholders of Indianapolis Gas until the owners of the bonds had been paid in full with interest (R. 163-164). The record discloses no effort on the part of any of these bondholders to prevent the consummation of the plan, but only an effort to require that their bonds and coupons and interest on coupons be paid in full.

ARGUMENT

We discuss briefly petitioners' three reasons for the allowance of a writ to show:

1. That there are no questions in this case which should result in the exercise of this Court's jurisdiction to grant the writ; and

2. That the decision below is a correct one.

First. There is no conflict between the decision of the Circuit Court of Appeals for the Seventh Circuit and that of any other Circuit Court of Appeals within the meaning of Subdivision 5(a) of Rule 38 of this Court.

The case which is relied upon to show such a conflict is a decision of the former Circuit Court of the Eastern District of Virginia in *Manning v. Norfolk Southern Railroad Co.*, 29 F. 838 (1887).

An examination of that case demonstrates its inapplicability to the present one. There, there was an attempt to waive interest on coupons before maturity, whereas here, petitioners are not good faith purchasers for value, but bought the coupons sued on with full notice of their dishonor.

(a) But if there had been a conflict of decision between two Circuit Courts of Appeal, under the rule announced in *Erie Railroad v. Tompkins,* 304 U. S. 64, 82 L. Ed. 1188, such a conflict on questions controlled by State law is not in and of itself a reason for granting a writ of certiorari.

Ruhlin v. New York Life Insurance Co., 304 U. S. 202, 82 L. Ed. 1290.

(b) The question here involved is purely one of local law i. e., the construction of the provisions of a mortgage.

Second. It is claimed that the writ should be granted because the decision of the Circuit Court of Appeals is in conflict with the weight of authority. It is not even claimed by petitioners that the decision of the Circuit Court of Appeals fails to follow the Indiana law and they do not even cite an Indiana case under this point.

Under the doctrine of *Erie Railroad v. Tompkins,* 304 U. S. 64, 82 L. Ed. 1188, it can make no difference what the law of other states or jurisdictions is provided the Indiana law has been followed by the Circuit Court of Appeals, which petitioners do not deny.

(a) The decision of the Circuit Court of Appeals is not, however, contrary to the weight of authority. There are two controlling cases decided by this Court which uphold voluntary plans of reorganization as against dissenting minorities.

Sage v. Central Railroad of Iowa, 99 U. S. 334, 25 L. Ed. 394;

Elwell, Trustee, v. Fosdick, 134 U. S. 500, 33 L. Ed. 998.

Third. It is now asserted *for the first time* that petitioners and other non-assenting bondholders have been deprived of their property without due process of law. Even if the claim had any merit it comes too late. No such claim was made in petitioners' complaint filed in the District Court nor was it asserted at the trial on the merits before the District Court nor was it assigned as error in the Circuit Court

of Appeals, nor even in petitioners' application for a rehearing.

A claim of the denial of a constitutional right made for the first time on application for a writ of certiorari comes too late.

New York, ex rel, Cohn v. Graves, 300 U. S. 308, 81 L. Ed. 666;
Herndon v. Georgia, 295 U. S. 441, 79 L. Ed. 1530;
Loeher v. Schroeder, 149 U. S. 580, 37 L. Ed. 856.

4. The decision of the Circuit Court of Appeals was obviously right.

Where a majority in interest of corporate bondholders adopt a plan or scheme of reorganization in pursuance of authority so to do contained in a trust indenture, all bondholders are bound by such plan. The provisions of Subdivision VII of the Trust Indenture in this case confer ample authority upon the majority to adopt such a plan or scheme and, when adopted, it binds all bondholders.

Elwell v. Fosdick, 134 U. S. 500, 33 L. Ed. 998;
Gates v. Boston, etc., Co., 53 Conn. 333, 5 Atl. 695;
Cowell v. City Water Supply Co., 105 N. W. (Ia.) 1016;
Phipps v. Chicago, etc., Co., 284 F. 945, 28 A.L.R. 1184, and particularly at page 1202;
Allen v. Moline Plow Co. (C.C.A.), 14 F. (2) 912, 913, 917;
Chicago, etc., Co. v. Fosdick, 106 U. S. 47, 27 L. Ed. 47;
Sage v. Central R. R. Co., 99 U. S. 334, 25 L. Ed. 394, 396, 397;

Florida v. National Bank of Jefferson, etc., Life Ins. Co., 123 Fla. 525, 167 So. 378, 108 A.L.R. 77, 84, 85, 86;

Pacific States, etc., Co. v. Hollywood, etc., 11 Cal. App. (2) 56, 52 Pac. (2) 1014;

Seibert v. Minneapolis, etc., Co., 52 Minn. 148, 53 N. W. 1134;

People v. Title & Mortgage Co., 264 N. Y. 69, 190 N. E. 153;

Moody v. Pacific, etc., Co., 174 Wash. 256, 24 Pac. (2) 609.

(a) The relation of the bondholders under a corporate mortgage on a public utility property is a peculiar one and the absolute right of control of such bondholders is limited not only by the express provision of the bonds and mortgage, but also in great measure by the nature and character of the security.

Canada Southern Railroad Co. v. Gebhard, 109 U. S. 534, 537;

Shaw v. Railroad Co., 100 U. S. 605, 25 L. Ed. 757;

Gates v. Boston Co., 53 Conn. 333, 5 Atl. 695.

(b) One of evils which the agreement for a plan or scheme of reorganization was designed to prevent is that frequently small minorities of bondholders resist arrangements for a fair adjustment of corporate obligations, unless they are accorded superior advantages over their fellow bondholders or are paid in full. No substantial reasons appear for permitting speculators to overthrow a plan of reorganization agreed to by almost 84% of the bondholders of Indianapolis Gas.

Sage v. Central R. R. Co. of Iowa, 99 U. S. 334, 25 L. Ed. 394;

Elwell, Trustee, v. Fosdick, 134 U. S. 500, 33 L. Ed. 998;

Palmer v. Bankers Trust Co., 12 F. (2) 747 (C.C. A. 8).

(c) All the named petitioners knew substantially 1½ months before the plan or scheme of reorganization was consummated that it was under consideration and were advised in a letter dated March 27, 1942, about five weeks before the consummation of the plan that it had been tentatively approved by the Board of Directors of Indianapolis Gas. They made no effort whatever to prevent the consummation of the plan, or the transfer of the property of Indianapolis Gas to the City and their inaction should have weight in preventing them from obtaining preferred treatment at this time.

The respondent, the City of Indianapolis, respectfully submits that petitioners' application for a writ of certiorari should be denied.

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